

Department of Labor and Industrial Relations

Wage Standards Division

**HAWAII FAMILY LEAVE LAW (HFLL)
and the
FAMILY AND MEDICAL LEAVE ACT (FMLA)

COMPARISON CHART**

JUNE 2010

*The attached is intended for reference purposes only.
It is not intended as a substitute for the actual law, and is subject to revision.*

FAMILY LEAVE COMPARISON CHART

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PROVISION	CHAPTER 398, HAWAII REVISED STATUTES	FAMILY AND MEDICAL LEAVE ACT OF 1993
Effective Dates	<p>1/1/92 Chapter effective for public sector (L1991 Act 328) 7/1/94 Chapter effective for private sector (L1993 Act 157)</p> <p>7/1/93 Director's rule making authority (L1993 Act 152)</p> <p>7/1/95 Various amendments(*) (L1995 Act 154) 7/1/96 Appeal and hearings provisions (L1995 Act 154) 7/1/97 Reciprocal beneficiary qualifying reason for leave (L1997 Act 383) 7/1/03 Sick leave definition, allow use of up to 10 days (L2003 Act 44) 7/1/07 Only employee may elect to substitute accrued paid leaves (L2007 Act 265)</p> <p>5/6/09 Posting notice required (L2009 Act 48)</p>	<p>8/5/93 Public and private sectors</p> <p>2/5/94 For employers under collective bargaining agreements</p> <p>2008 H.R. 4986, eff. 1/16/09: the National Defense Authorization Act; "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves"</p>
Covered Employer	Employs 100 or more employees within the state for each working day during 20 or more calendar weeks in the current or preceding calendar year	Employs 50 or more employees for each working day during 20 or more calendar workweeks in the current or preceding calendar year
Eligible Employee	<p>Employee must have at least six months of consecutive employment</p> <p>No restrictions based on number of hours worked</p> <p>The Hawaii law does not cover federal employees</p>	<p>Employee must have worked at least 12 months (not necessarily consecutive), and 1,250 hours in the preceding 12 months. Must also be employed at a worksite by an employer with 50 or more employees within 75 miles of that worksite.</p> <p>Private, state, local, and certain federal government employees</p>
Definition of Child	<p>Biological, adopted, or foster son or daughter of an employee; a stepchild; a legal ward of an employee</p> <p>No limitation on age of child under the Hawaii law</p>	<p>Biological, adopted, foster, step son or daughter; legal ward; or child of a person standing in loco parentis</p> <p>Must be under 18 years of age, or an adult child incapable of self-care due to mental or physical disability</p>
Definition of Parent	Biological, foster, adoptive parent; a parent-in-law; a stepparent; a legal guardian; a grandparent; or a grandparent-in-law	Biological parent or an individual who stood in loco parentis to an employee when the employee was a son or daughter; but not a parent-in-law

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Health Care Provider	Person qualified by the director to render health care and service, and with a license to practice medicine, dentistry, chiropractic, osteopathy, naturopathy, optometry, podiatry, and psychology	Doctor of medicine or osteopathy authorized to practice in the State; podiatrists, dentists, clinical psychologists, optometrists, chiropractors (for manual manipulation of spine to correct subluxation demonstrated by X-ray); nurse-practitioners and nurse-midwives if authorized to practice under State law; or Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts
Serious Health Condition	A physical or mental condition that warrants the participation of the employee to provide care during the period of treatment or supervision by a health care provider, and: 1. Involves inpatient care in a hospital, hospice, or residential health care facility; or 2. Requires continuing treatment or continuing supervision by a health care provider	Illness, injury, impairment, or physical or mental condition involving incapacity or treatment connected with inpatient care in a hospital, hospice, or residential medical-care facility; or, continuing treatment by a health care provider involving (1) incapacity or absence of more than 3 days from work, school, or other activities; (2) chronic or long-term condition incurable or so serious if not treated would result in incapacity of more than 3 days; or (3) prenatal care
Twelve-Month Period	The four-week entitlement is based on a <u>calendar year</u> (§§ 398-3, HRS, & 12-27-1 & 6(d), HAR). The limitation to the entitlement can be based on a <u>twelve-month period</u> (§§ 398-3(d), HRS, & 12-27-6(c)), which might not be measured as a calendar year. The employer cannot change from one twelve-month method to another if the transition results in the reduction or loss of any family leave benefit, or is intended to avoid the requirements of the law.	Family leave entitlement and use for birth or adoption is based on a twelve-month period, which may not necessarily be a calendar year.
Unpaid or Paid Leave	The intent of the law is to entitle an eligible employee to four weeks of job protected unpaid leave for qualifying reasons. Effective July 1, 2003, an employee may elect to substitute accrued sick leave for family leave purposes, provided that an employee shall not use more than ten days per year for this purpose, unless a collective bargaining agreement provides for the use of more than ten days (§ 398-4(c), HRS, and 12-27-9, HAR). Effective July 10, 2007, the employee chooses whether to use vacation or sick leave for a paid family leave. The "employer" was deleted from § 386-4(b), leaving only the	Allows "eligible" employees of a covered employer to take up to a total of 12 workweeks in any 12 months (see Sec. 825.200(b)) job-protected, unpaid leave for qualifying reasons. Permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. See Sec. 825.300(c).

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	<p>"employee" as having a choice.</p> <p>However, when an employer has a self insured TDI plan, using the company's sick leave policy, an employee may not use more than the statutorily required minimum that the employer is required to reserve for each employee.</p> <p>Unless the employer agrees, the shortest allowable incremental period of accrued leave that may be substituted for any part of the HFL is the shortest period of time that the employer's payroll system uses to account for the use of leave, provided that the shortest incremental period is one hour or less (§ 12-27-7(c), HAR). Therefore, the employer can designate fifteen minutes, or thirty minutes depending on the payroll system, but not one hour and a half, or half a day as the shortest increment to take leave.</p>	<p>The employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour</p>
Qualifying Reasons for Leave	<p>Birth of the employee's child, or the adoption of a child, or to care for an employee's child, spouse or reciprocal beneficiary, or parent with a serious health condition</p> <p>Leave for the employee's own serious health condition is not covered</p>	<p>Birth, placement of child for adoption or foster care, to provide care for parent, child, or spouse with a serious health condition, or for the employee's own serious health condition</p> <p>Military family leave: spouse, son, daughter, parent, or next of kin permitted to take up to 26 workweeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness (eff. 1/16/2009)</p>
Amount of Leave Entitlement	<p>A total of four weeks during any calendar year</p> <p>Employee is not entitled to more than four weeks of leave in any twelve-month period</p> <p>Leave is not cumulative from year to year</p>	<p>A total of 12 workweeks during any twelve-month period</p> <p>For births or adoptions, the entitlement expires at the end of the 12-month period beginning on the birth or adoption date</p>
Intermittent Leave	<p>Allowable for all qualifying reasons</p> <p>Need not be taken immediately upon births or adoptions, but limited to four weeks within a twelve-month period</p>	<p>Intermittent or reduced leave schedule permitted for serious health condition when medically necessary</p> <p>Not permitted for birth or adoption unless employer agrees</p>

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Converting a "Week" to Equivalent Hours	<p>An employer is allowed to convert the four week entitlement to an equivalent number of hours based on the <u>current</u> regular work week of the employee.</p> <p>As in the FMLA, if an employee's work schedule varies, the average weekly hours worked during the twelve weeks prior to the start of the HFL will be used to calculate the employee's 'normal' work schedule for this purpose."</p>	<p>Employers must grant intermittent FMLA leave or leave on a reduced schedule when</p> <ul style="list-style-type: none"> - the employee's own "serious health condition" renders him unable to do his job; - to employees who need to care for a spouse, son, daughter or parent with a serious health condition; - to employees, under the FMLA's military leave provisions, for qualifying exigencies and to care for a covered servicemember with a serious illness or injury. <p>The care needed can encompass both physical and psychological care and can even include driving the family member to the doctor.</p>
Relationship to Paid Leave	<p>Leave shall consist of unpaid or paid leave, or a combination of paid and unpaid leave</p> <p>Leave in addition to employer-paid family leave which is needed to attain the four weeks may be unpaid</p> <p>An employee may elect to substitute any accrued paid vacation, personal, or family leave for any part of the four-week period</p> <p>An employee shall be permitted to use up to 10 days of accrued and available sick leave, unless an express provision of a valid collective bargaining agreement authorizes the use of more than 10 days. Employer is not required to diminish an employee's accrued and available sick leave below the amount required by Section 392-41 (TDI law)</p>	<p>Unpaid leave for the 12 weeks</p> <p>Leave in addition to employer-paid family and medical leave to attain the 12 weeks may be unpaid</p> <p>No limits on substituting paid vacation or personal leave. Employee may not substitute paid sick, medical, or family leave for any situation not covered by employer's leave plan</p>
Leave Sharing Required for Spouses Employed by the Same Employer	No limitation under the Hawaii law. Each spouse is entitled to four weeks of family leave.	Number of leave workweeks for both may be limited to 12 weeks within a twelve-month period for birth, adoption, foster care, or to care for a parent with a serious health condition

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Employment and Benefits Protection	<p>Except for workforce reduction situations, the employee must be restored to the same or equivalent position held prior to the leave, or restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment</p> <p>No loss of accrued employment benefits except paid leave expended for the family leave</p>	<p>Restoration</p> <p>Limited denial of restoration is allowed if employee is salaried and in highest paid 10 per cent of employees within 75 miles of facility where employed, and if such denial is necessary to prevent "substantial and grievous economic injury" to operations</p>
Unreduced Compensation for FLSA Exempt Employees	An employer can deduct unpaid family leave time off within a work week without jeopardizing the employee's FLSA exempt status. Employers are cautioned, however, that the exemption could be affected by the deduction of non-HFLL leaves (i.e., leaves for non-family leave reasons) from a work week, depending on the circumstances.	If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. See 29 CFR 541.602(b)(7).
Maintenance of Health Benefits During Leave	None under the Hawaii law	Health insurance and benefits must be maintained under the same conditions as prior to taking leave, subject to recapture of costs for employee's failure to return to work without cause
Record keeping	In accordance with 12-27-13, HAR, pertaining to investigation of employer records.	In accordance with 11(c) of the Fair Labor Standards Act and related regulations
Notice of Foreseeable Leave	Notice in a manner that is reasonable and practicable	Not less than 30 days notice, or if less than 30 days is available, such notice as is practicable
Notification to Employees	Written notice setting forth employees' rights and responsibilities under the statute is required at the time of hire (12-27-10, HAR)	<p>Notices setting forth pertinent provisions of the Act and complaint filing must be posted conspicuously at the place of employment</p> <p>Civil penalty for wilful violation of above: Up to \$100 for each separate offense</p>
Certification of Serious Health Condition	<p>An employer may require written certification by a health care provider of the individual requiring care. Certification shall be considered sufficient if it provides information as required by the director</p> <p>Optional form HFLL-1 Hawaii Family Leave Certification of Serious Health Condition</p>	<p>With limitations, employer may require up to three opinions and certifications for a serious health condition</p> <p>Separate forms for different reasons for leave</p>
Educational employee	No restriction under the Hawaii law	Limitations may apply to teachers and instructional employees of local educational agencies

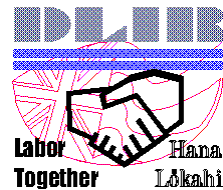
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Key Employee Exemption	None under the Hawaii law	Exempts salaried employee if among the highest paid 10% and restoration would lead to grievous economic harm to the employer
Filing of Complaint	Must be filed within 90 days after the 1) date of the alleged unlawful act; or 2) date of discovery by the employee of the alleged unlawful act; however, in no event shall such a complaint be filed after the expiration of 180 days of the alleged unlawful act.	Should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation
Appeal and Hearing	Effective 7/1/96, provisions for: (1) Employer appeal of orders issued; and (2) Administrative hearings	None
Remedies and Penalties	Civil: Damages in the amount of wages, employment benefits, or other compensation; equal amount as liquidated damages; reasonable legal fees and costs Criminal: Petty misdemeanor (fined not more than \$1,000 and imprisoned not more than 30 days)	Damages in the amount of wages, employment benefits, or other compensation; equal amount as liquidated damages; reasonable legal fees and costs

REMINDERS:

- The intent of the Hawaii Family Leave Law, as stated in Section 398-10, is to establish a minimum standard which is not intended to replace family leave policies which provide equal or greater benefits than under the Hawaii Family Leave Law.
- An employer cannot offset TDI (covering the employee's own disability) against an employee's Hawaii family leave (covering only for the care of the employee's child, spouse, reciprocal beneficiary, or parent).

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